COMMONWEALTH OMBUDSMAN

PUBLIC INTEREST DISCLOSURE SCHEME

Insights paper

Making time: Investigating Public Interest Disclosures

This Insights Paper provides guidance to agencies on investigation timeframes and extension requests.

It covers:

- the importance of timely investigation of public interest disclosures
- what agencies should include in a request for more time to investigate
- how we expect agencies to engage with disclosers on the progress of an investigation and extension requests.

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Introduction and summary

The purpose of the *Public Interest Disclosure Act 2013* (the PID Act) is to promote the integrity and accountability of the Commonwealth public sector by encouraging and facilitating current and former Commonwealth public officials to make public interest disclosures (PIDs) about wrongdoing in the public sector.

PIDs should be handled as expeditiously as possible. This is because PIDs can highlight wrongdoing or risk that an agency may need to remedy quickly. Timely handling of a PID can also help agencies maintain confidentiality over the investigation, mitigate risk of reprisal to a discloser, and support discloser wellbeing. Good investigation planning and well-considered extension requests can help manage timeframes, mitigate the need for repeat applications and minimise the impact extensions of time can have on a discloser.

The Ombudsman can grant such additional time to investigate as they consider appropriate. In order to help the Ombudsman form a view on what is appropriate in the circumstances, agencies should explain what has been done to date, what remains to be done, and how the agency plans to complete that work within the time requested. An extension request should be made at least 10 business days before the investigation end date.

Extension requests from agencies should not come as a surprise to disclosers. Agencies should keep disclosers updated on the handling of PIDs. Agencies are encouraged to let the discloser know as early as possible that more time is required before they apply for an extension including explaining why it is required and the steps that need to be taken to complete the investigation.

Failure to complete an investigation within time does not mean the investigation no longer needs to be completed or is invalid. However, it **is one of the criteria that, if collectively satisfied, will allow the discloser to make their disclosure outside of government** (external disclosure) while retaining the immunities and protections of the PID Act.

Reasons for this insights paper

The Ombudsman is responsible for determining requests for extensions of time to complete PID investigations (see section 52(3) of the PID Act).

In the course of reviewing extension requests, the Ombudsman has identified the following areas for improvement:

- better planning of PID investigations so the need for extension requests is reduced
- ensuring requests contain sufficient information about the investigation's progress and why more time is required to complete it, and
- engagement with the discloser during an investigation and when an extension request is to be made.

The Ombudsman may decline to grant an extension request where an agency has not provided clear reasons for the request, or where the investigation appears to have been subject to unreasonable or unexplained delay.

After reviewing this insights paper, agencies should come away with an understanding of **what they should include in their extension requests**.

Ensuring timely investigations

The PID Act provides that **agencies have 90 days after allocation**, or such longer period as determined by the Ombudsman, to complete a PID investigation. A PID investigation is complete when the agency has finalised the investigation report. Providing a copy of the report to the discloser may occur within a reasonable period after this date.

For simple matters, 90 days should be sufficient to complete a PID investigation or determine if a different type of investigation is required. For more complex matters, 90 days should be sufficient to determine if a different type of investigation is required or to obtain a more accurate estimate of how long investigation under the PID Act may take. The conduct and resourcing of investigations should be commensurate with the complexity and scale of what is raised in the PID.

When a matter is allocated for investigation, the investigator should:

- ✓ clarify the conduct that is to be investigated
- ✓ identify the types of evidence relevant to the investigation and the time estimated to obtain the evidence, and
- ✓ plan for contingencies that may affect the investigation's completion date.

  This can include witness availability or difficulty in obtaining documentary evidence, requirements to afford procedural fairness or to allow for internal quality checking processes.

All of the above should be properly documented in accordance with the *Australian Government Investigations Standard* (AGIS) [1]. The AGIS and the Office's *Agency Guide to the PID Act* both contain further guidance that can be applied to the planning, initiation and conduct of PID investigations.

Making a disclosure can be a stressful and isolating experience. Principal officers are required to give disclosers an estimate of the time needed to investigate a PID shortly after allocation. For a discloser this date can be particularly significant. It can mark the day when they can reasonably expect some response to the concerns they raised and be able to move on with their lives. It can mark a point where the risk of reprisal or a breach of confidentiality might lessen (because the investigation is concluded). Conversely it can mark a point where the risk of reprisal may increase (because of actions that are to be taken in response to findings and recommendations). With this in mind, it is easy to see why requests for extensions of time, particularly repeat requests, should be avoided as much as possible in the interests of discloser wellbeing.

Better planned and documented investigations will help agencies:

- ✓ identify at the earliest opportunity whether an extension of time should be requested and how much time is needed
- ✓ provide better information in support of extension requests, and
- ✓ reduce the need for further requests as much as possible.

[1] Australian Government Investigations Standard

Deciding what is appropriate

The Commonwealth Ombudsman can grant extensions of time either on request from a discloser or agency or, alternatively, on their own initiative.

An extension request from an agency or a discloser should be made by completing the relevant form, which can be obtained from the Commonwealth Ombudsman's website and emailed to PID@ombudsman.gov.au. Agencies should visit the website for the latest form for each request as the forms are regularly updated.

The Ombudsman will not automatically grant extensions. Section 52(3) of the PID Act states that the Ombudsman **may grant such additional time as the Ombudsman considers appropriate**. This could be more time or less time than requested, or no additional time at all.

It is the Ombudsman's expectation that agencies use their best efforts to complete an investigation in time. It is important that extension requests provide sufficient justification for the time sought and are submitted with enough time for consideration by this Office. Agencies should be ready to respond to requests for further information.

Agencies should ensure that their extension requests:

- ✓ explain what progress has been made in the investigation to the point of the request
- ✓ explain why an extension of time to complete the investigation is required, including
  - why the investigation has not been completed within either the initial 90-day period or such additional period as previously granted by the Ombudsman
  - what work needs to be done to complete the investigation and a plan for its completion, and
  - what the agency plans to do to ensure the investigation will be completed within the requested period
- ✓ include a well-considered future date for completion of the investigation.

One of the consequences of not completing an investigation in time is that the discloser may be able to make an external disclosure. Agencies should turn their mind

to whether this could adversely affect completion of the PID investigation or action that might be taken in response to its findings.

Detailing the progress of the investigation and next steps

The Ombudsman has observed a number of **issues in extension requests which make it difficult to decide whether more time is appropriate and whether the period of time requested is appropriate**, including:

- ✕ details of investigation progress being copied verbatim from previous extension requests
- ✕ limited or broadly described details of the investigation's progress, making it difficult to understand what investigative activity has been undertaken to date. For example:
    - "Reviewed materials and considered applicable policy and guidelines"
    - "Spoke to witnesses and identified additional lines of inquiry"
- ✕ limited or no explanation for a lack of progress in an investigation
- ✕ limited or no explanation of what further investigative steps are required and what they entail. For example:
    - "Further lines of inquiry need to be undertaken"

Agencies should ensure that their extension requests:

✓ explain at a high level what investigative steps have been taken, when, and how those steps have progressed the investigation

For example:

The discloser has alleged that Policies A and B have been contravened. The agency has located and reviewed relevant records and assessed them against the requirements for each of these policies. Three witnesses with

knowledge of the events connected to the alleged contraventions have been identified and interviews took place on X [DATEs]

- ✓ explain at a high level what future investigative steps are to be undertaken, why they are needed, and a date for completion

  For example:

  An extension request is sought because the current investigation has identified a further three witnesses with knowledge of particular incidents that need to be spoken with prior to the investigation being finalised. The investigation will progress as follows:

  .....

  [DATEs]

- ✓ explain the circumstances that have prevented the investigation meeting the completion date, including how the agency plans to avoid similar issues arising in the future
- ✓ if unexpected or unforeseen developments in the investigation occurred which impacted the progress of the investigation, explain what occurred and the impact it had
- ✓ where further time is required due to difficulties in obtaining evidence or speaking with witnesses, explain why this has occurred and propose steps to mitigate further impacts on investigation progress
- ✓ if an extension of time is requested due the volume of information to be reviewed, outline if there are additional resources available to assist in this task.

If the Ombudsman decides to grant an extension, they must notify the discloser of that fact including the reasons for the decision. The notification will be informed by the reasons given to us by the agency in the extension request.

If extension requests include sensitive information that may negatively impact the investigation if made known to the discloser, this should be flagged in the extension request. The Ombudsman will consider how to meet the legislative requirement to inform disclosers of reasons for extensions, while safeguarding sensitive information.

Requesting an appropriate period of time to complete a PID investigation

It is up to the agency to decide what period of time is needed to complete the investigation in accordance with the matter's investigation plan, and this should be the period of extension requested. An investigation plan should detail the further steps needed in the investigation and inform the anticipated timeframe for completion.

Requesting a shorter period of time to complete an investigation does not make it more likely that the Ombudsman will grant an extension request. When considering an extension request the Ombudsman considers whether the time requested appears sufficient for the agency to conclude their investigation, in all the circumstances.

Keeping disclosers updated

Section 52(5)(a) of the Act requires the Ombudsman to notify disclosers if an extension is granted and the reasons for the extension.

We have observed that, on occasion, our notice to the discloser appears to be the first the discloser has heard about the investigation for some time.

More generally we have observed various sub-optimal approaches to engaging with disclosers when agencies are seeking an extension of time. Some examples of this include:

- ✕ not consulting with the discloser prior to making an extension request
- ✕ letting the discloser know that the agency is seeking an extension request on the same day as the request is submitted to our Office
- ✕ advising in the extension request that the discloser was consulted but omitting to include when the discloser was consulted and what their views on the request were.

Engage with the discloser where possible

If the discloser is not anonymous to the agency, it is best practice to keep them informed of the investigation's progress and to engage with them prior to requesting an extension of time. Engaging with the discloser allows them to understand how the investigation is progressing and why more time is required. It is important to note that while a discloser may object to an agency requesting an extension, this does not mean that the extension request will not be granted.

Where the discloser is contactable agencies should:

- ✓ keep the discloser updated on progress (noting investigations have varying needs for confidentiality and sensitivity)
- ✓ **before submitting a request to this Office** - engage with disclosers on the need for an extension and allow time for the discloser to provide views or comments
- ✓ where disclosers provide views on the extension request, provide these to our Office with the request.

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